

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

WILLIAM MICHAEL JONES,

00-CV-1795-BR

Plaintiff,

OPINION AND ORDER

v.

ROBERT ROSE, *et al.*,

Defendants.

WILLIAM MICHAEL JONES

2716 N.E. Mason St.
Portland, OR 97211
(503) 284-0502

Plaintiff, *Pro Se*

ROBERT J. TENPAS

Acting Assistant Attorney General

CYNTHIA J. MORRIS

DAVID KAPLAN

Environmental & Natural Resource Division
Environmental Defense Section
P.O. Box 23986
Washington, D.C. 20026-23986
(202) 616-7554

SAMANTHA KLEIN

Natural Resources Section
P.O. Box 663
Washington D.C. 20044
(202) 305-0474

Attorneys for Federal Defendants

LINDA MENG

City Attorney

TERENCE L. THATCHER

Deputy City Attorney
1200 S.W. Fourth Ave.
Portland, OR 97210
(503) 823-4047

Attorneys for City of Portland Defendants

JEFFREY W. LEPP

LAURIE K. BEALE

Stoel Rives LLP
600 University St., Suite 3600
Seattle, WA 98101
(206) 624-0900

Attorneys for Defendant Port of Portland

BROWN, Judge.

This matter comes before the Court on Defendant Port of Portland's Motion for Limited Reconsideration (#976) of the Court's ruling on the Port's Cross-Motion for Partial Summary Judgment (#753). See Opin. and Order (#971) at 81 (issued Feb. 28, 2008).

For the reasons that follow, the Court **GRANTS** the Port's Motion for Limited Reconsideration, and, on reconsideration, the

Court **GRANTS** the Port's Cross-Motion for Partial Summary Judgment.

BACKGROUND

Plaintiff moved for partial summary judgment (#704) that the Port violated the Clean Water Act, 33 U.S.C. § 1404(a), by installing tide gates on West Hayden Island (WHI) without first obtaining a § 404(a) Permit. Plaintiff contended a permit was required because the Port's installation of tide gates unlawfully restricted the reach and flow of the Columbia River on WHI. The Port did not dispute that it installed tide gates with attached culvert extensions on WHI without obtaining a § 404(a) Permit.

On April 30, 2007, the Port filed a Cross-Motion for Partial Summary Judgment in which it presented undisputed evidence that the tide gates were removed before Plaintiff filed this action. As a consequence, the Port argued any violation of the CWA arising from installation of the tide gates was moot because it was a "wholly-past" violation. *See Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 529 (9th Cir. 2001)(under the citizen provisions of the CWA, 33 U.S.C. § 1365(a), a court lacks jurisdiction to review wholly-past violations). The Port, however, did not present any evidence that the attached culvert extensions were removed along with the tide gates.

Although the Court agreed with the Port that any violation

of the CWA arising from the installation of tides gates was moot, the Court found Plaintiff's claim arising from installation of the culvert extensions was not moot in the absence of evidence that the Port removed culvert extensions before Plaintiff filed this action. See Opin. and Order at 78-79 (issued Feb. 28, 2008). The Court concluded a genuine issue of material fact existed as to whether the culvert extensions restricted the reach and flow of the Columbia River on WHI and, therefore, denied Plaintiff's Motion for Partial Summary Judgment on that issue.

DISCUSSION

The Port notes Plaintiff never addressed the issue of the culvert extensions either factually or legally in any memorandum or evidentiary pleading in support of his Motion for Partial Summary Judgment or in opposition to the Port's Cross-Motion for Partial Summary Judgment. The Port now presents undisputed evidence that it removed the culvert extensions in 2000 when it removed the tide gates to which the culvert extensions were attached. See Port's Mot. for Partial Summary J., Laubenthal 2d Supplemental Decl. ¶ 5 and Hendricks Decl. ¶ 8.

Notably, Plaintiff does not dispute the factual accuracy of the Port's latest Declarations to the extent that they establish the Port removed the culvert extensions at the same time the Port removed the tide gates. Plaintiff, however, notes this Court

previously ruled it will not reconsider its prior dispositive rulings and, therefore, should abide by that ruling here. If the Court decides to reconsider its prior ruling as to the Port's Motion, however, Plaintiff asserts the Court also should reconsider evidentiary rulings that were adverse to Plaintiff and allow Plaintiff to file motions to strike and motions to compel production of documents.

In the exceptional circumstances presented here, the Court concludes the Port's supplemental evidence makes clear any CWA violation arising from the Port's installation of the culvert extensions was a "wholly-past" violation. Accordingly, Plaintiff's CWA claim against the Port for installing both the tide gates and the attached culvert extensions without a § 404(a) Permit was already moot when Plaintiff filed this action and this Court lacked subject-matter jurisdiction over Plaintiff's claim. The Court also rejects as improvident Plaintiff's request for a *quid pro quo* reconsideration of evidentiary rulings adverse to Plaintiff and for the opportunity to engage in further evidentiary motion practice.

CONCLUSION

For these reasons, the Court **GRANTS** the Port's Motion for Limited Reconsideration (#976), and, following reconsideration,

the Court **GRANTS** the Port's Cross-Motion for Partial Summary Judgment (#753).

IT IS SO ORDERED.

DATED this 24th day of June, 2008.

/s/ Anna J. Brown

ANNA J. BROWN
United States District Judge